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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

TRANG PHAN,

Plaintiff and Appellant,

v.

THUY MAI,

Defendant and Respondent.

[And six other cases.*]

*Trang Phan v. Ngoc Mai (No. 107CH000984); Trang Phan v. Loc Mai (No. 107CH001039); Loc Mai v. Anh Nhu Pho (No. 107CH001076); Thuy Mai v. Trang Phan (No. 107CV079516); Trang Phan v. Thuy Thanh Mai (No. 107CV083920); Trang Phan v. Loc Mai (No. 107CV083921).

H033119

(Santa Clara County

Super. Ct. No. 107CH000977)

This purported appeal involves seven cases. Four of the seven cases are civil harassment proceedings (see Code Civ. Proc., § 527.6); three are civil actions.¹ The purported appellants are Trang Phan and Anh Pho, apparently wife and husband. Respondents are Thuy Mai, allegedly Anh Pho's former "putative spouse," and Ngoc Mai and Loc Mai, apparently Thuy Mai's siblings. Trang Phan and Anh Pho, who are

¹ All further statutory references are to the Code of Civil Procedure.

representing themselves, provided seven volumes of appellants' appendix. (See Cal. Rules of Court, rule 8.124.) Their appellate briefs were difficult to decipher.

Respondents Thuy Mai and Loc Mai moved to dismiss the appeal and brought a motion for sanctions, supported by a declaration, against purported appellants.² (Cal. Rules of Court, rule 8.276.) By written letter, this court gave notice that it is considering imposing sanctions, on the motion of respondents Thuy Mai and Loc Mai and on its own motion, and it informed purported appellants that they were entitled to address the issue of sanctions at oral argument. Trang Phan and Anh Pho filed written opposition to the imposition of sanctions against them. After the matter was set for oral argument, Trang Phan and Anh Pho, by written letter unsupported by any affidavit or declaration under penalty of perjury, requested the appeal be taken off calendar for medical reasons.

After carefully reviewing the record provided, this court has determined that it does not establish that purported appellants have any right to appeal. We also conclude that this purported appeal is indisputably without merit and sanctions are appropriate.

A. Procedural History

The record provided shows the following. Three of the civil harassment proceedings were initiated by purported appellant Trang Phan, in pro per; one against respondent Thuy Mai (107CH000977), a second against respondent Ngoc Mai (107CH000984), and a third against respondent Loc Mai (107CH001039). In that third civil harassment proceeding, Loc Mai, represented by attorney Sterling Harwood, filed a counter "Request for Orders to Stop Harassment" against Trang Phan. In a fourth civil harassment proceeding, respondent Loc Mai, represented by attorney Harwood, filed a "Request for Orders to Stop Harassment" against Anh Pho (107CH001076). A minute

² Respondent Ngoc Mai impliedly requests sanctions in her brief. Rule 8.276 of the California Rules of Court requires a party to seek sanctions by motion, which includes a declaration supporting the amount of any monetary sanction sought.

order issued on July 24, 2007 "link[ed]" case no. 107CH000977 to case no. 107CH000984.

The first civil case is a civil defamation action brought by respondent Thuy Mai, represented by attorney Harwood, against Trang Phan, which alleges that Trang Phan sent defamatory e-mails to the judge presiding over a separate case brought by Thuy Mai against Anh Pho (107CV079516). The second civil case is an action brought by Trang Phan against Thuy Thanh Mai alleging assault, slander and intentional infliction of emotional distress (107CV083920). The third civil case is an action brought by Trang Phan against Loc Mai alleging assault, slander and intentional infliction of emotional distress (107CV083921). In January 2008, the court, on its own motion, ordered the three civil lawsuits consolidated under case no. 107CV079516.

On March 10, 2008, apparently the date set for trial on the four civil harassment proceedings, Judge Jamie Jacobs-May began by holding an off-the-record settlement conference. Back on the record later that day, the court stated that a settlement had been reached with regard to all seven cases. The agreed settlement involved (1) dismissal of the seven cases with prejudice, (2) an agreement that the parties would not say anything insulting or disparaging about the opposing parties, would not interfere with the opposing parties' peaceful enjoyment of their lives, and would not telephone the opposing parties or their friends or family, (3) an agreement that Thuy Mai, Loc Mai, and Ngoc Mai would pay Trang Phan a total of \$2,500 by certified check, which would be delivered by April 15, 2008 to attorney Harwood, who represented Thuy Mai and Loc Mai, and Trang Phan would pick it up, and (4) retention of jurisdiction under section 664.6 to enforce the agreement and understanding that, if the money was not paid, the court would enter a judgment against Thuy Mai, Ngoc Mai (her sister) and Loc Mai (her brother), jointly and severally, for \$2,500. The court had the parties, including appellants, personally confirm on the record that each understood the settlement, agreed with its terms and conditions,

and wanted the court to convert the settlement into a court order. The court asked attorney Harwood to draft the stipulation and order and to provide it to "the other side for approval as to form and content" and stated it would then "sign off on it."³ The court stated that each side would bear its own costs and attorney's fees with respect to all seven cases.

The March 10, 2008 minutes regarding the four civil harassment proceedings stated that the proceedings had been resolved, the court had recited the terms on the record, and the terms had included dismissal of the three civil actions with prejudice. The minutes also stated that the parties had agreed with the terms and indicated their wish for their agreement to become a court order.

On March 11, 2008, in the civil cases consolidated under case no. 107CV079516, Judge Levinger set a hearing regarding dismissal after settlement for April 24, 2008.

On April 11, 2008, Trang Phan and Anh Pho filed a motion in the four civil harassment cases asking the court to reset the trial date, to *not* dismiss the seven cases, and to reissue a temporary restraining order protecting them because Thuy Mai had violated the settlement on March 19, 2008 by defaming them in court during a separate family law case, *Mai v. Pho*. They argued that the alleged defamation was "a good cause supporting for reason why the cases should not be dismissed."⁴

³ California Rules of Court, rule 3.1590, which is cited as an authority for this appeal, is inapposite. The rule pertains to trial of a question of fact by the court and specifies the proper procedure where a court designates a party to prepare a proposed statement of decision and judgment. The rule has no application to a stipulated settlement of a case.

⁴ In bringing their April 11, 2008 motion, Trang Phan and Anh Pho relied in part on California Rules of Court, rule 3.1385. Subdivision (c) of that rule establishes an exception to judicial dismissal of conditional settlements: "If the settlement agreement conditions dismissal on the satisfactory completion of specified terms that are not to be performed within 45 days of the settlement, the notice of conditional settlement served and filed by each plaintiff or other party seeking affirmative relief must specify the date by which the dismissal is to be filed. If the plaintiff or other party required to serve and

On April 24, 2008, Judge Elfving continued the hearing regarding dismissal of the consolidated civil cases after settlement until June 26, 2008.

By order filed on May 1, 2008, Judge Schwarz vacated the hearing on Trang Phan's and Anh Pho's motion to reset the trial date. The order states that the court had determined that the "motion does not request relief this Court can grant as all involved cases were dismissed with prejudice at the trial held by the Honorable Jamie Jacobs-May on March 10, 2008."

A minute order, filed on June 2, 2008 in case no. 107CH000977, states that "[t]his case has been dismissed with prejudice" and "[a]ll future filings are barred in this file and all other related files that have been dismissed (107CH000977, 107CH001039, 107CH001076)."

In case no. "1-07-CH-000977 (Lead Case)," Judge Jamie Jacobs-May issued an "[a]s attached" order, using a standard Judicial Council form "Findings and Order After Hearing (Family Law—Custody and Support—Uniform Parentage)," based upon the March 10, 2008 hearing. It was dated June 24, 2008 and filed June 25, 2008. The "as attached" order was not included in appellants' appendix. On this court's own motion, the appellate record was augmented to include the attachment, which consisted of the portion of the March 10, 2008 reporter's transcript containing the oral recital of the stipulated settlement of the seven cases.

Appellants' appendix also contains a standard form "Request for Dismissal," dated and filed on June 25, 2008 in case no. "1-07-CH-000977 (Lead Case) (7 Cases Total)," signed by attorney Harwood as attorney for Thuy Mai and Loc Mai, which requested the

file a request for dismissal within 45 days after the dismissal date specified in the notice does not do so, the court must dismiss the entire case *unless good cause is shown why the case should not be dismissed.*" (Italics added.) This rule does not provide authority for undoing a stipulated settlement enforceable under section 664.6.

court clerk to dismiss with prejudice.⁵ The record reflects that the clerk entered dismissal as requested the same day.

There are two different two notices of appeal. The first notice of appeal, filed on June 30, 2008 in case no. 107CV079516 ("lead cases total 3 cases"), indicates that appellants are appealing from the judgment or order entered on June 24, 2008 and from "an order after hearing under CCP section 581" and "dismissal of seven civil cases." Anh Pho's name is crossed out by hand in this notice of appeal. A second notice of appeal, filed on July 1, 2008 in case no. "1-07-CH-000977 (lead case)," states they are appealing from "[a]n order after hearing under CCP section 581" and "dismissal of seven civil cases."

B. No Right to Appeal Established

Their briefs indicate that Trang Phan and Anh Pho are attempting to appeal from the court order dated June 24, 2008 and the court order filed on May 1, 2008. They have not established a right to appeal.

⁵ Under section 581, subdivision (b), "[a]n action may be dismissed in any of the following instances: [¶] (1) With or without prejudice, *upon written request of the plaintiff to the clerk*, filed with papers in the case, or by oral or written request to the court at any time before the actual commencement of trial, upon payment of the costs, if any. [¶] (2) With or without prejudice, by any party upon the written consent of all other parties. . . ." (Italics added.) While presumably dismissal of the seven cases by the clerk was requested by attorney Harwood on behalf of Thuy Mai and Loc Mai to facilitate the stipulated settlement, the dismissal request did not include the written consent of any other party. A clerk lacks statutory authority under section 581, subdivision (b)(1), to enter a dismissal upon request where the requester is not the plaintiff. Neither Thuy Mai nor Loc Mai was the plaintiff/petitioner in five of the seven cases that were the subject of settlement. In one of those five cases, the civil harassment proceeding brought by Trang Phan against Ngoc Mai (107CH000984), Thuy Mai and Loc Mai were not even parties. But appeal is not the proper method of seeking relief from a clerk's improper entry of dismissal upon request under section 581, subdivision (b)(1), because such dismissal is not appealable. (See § 904.1; *Associated Convalescent Enterprises v. Carl Marks & Co., Inc.* (1973) 33 Cal.App.3d 116, 120, cited with approval in *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 380.)

"[T]he right to appeal in civil actions is wholly statutory. (*Supple v. City of Los Angeles* (1988) 201 Cal.App.3d 1004, 1009 . . .)" (*Rao v. Campo* (1991) 233 Cal.App.3d 1557, 1564.) Generally, an appeal may be taken from a judgment or from an order made after an appealable judgment or from other specified orders not relevant here. (§ 904.1, subd. (a)(1) and (a)(2); see § 904.) The record before us fails to establish that the May 1, 2008 order was either an order after judgment or another type of order specifically made appealable.

Even if the court's June 24, 2008 "as attached" order is deemed a judgment (but see § 581d ["All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments"]), Trang Phan and Anh Pho are not entitled to appeal. Only "aggrieved" parties may appeal. (§ 902 ["Any party aggrieved may appeal in the cases prescribed in this title"].) The statutory "aggrieved" requirement establishes standing to appeal. (*Rao v. Campo, supra*, 233 Cal.App.3d at p. 1564.) " 'One is considered "aggrieved" whose [legal] rights or interests are injuriously affected by the judgment.' (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737 . . .)" (*Estate of Goulet* (1995) 10 Cal.4th 1074, 1079, fn. 3.) "It is settled that a party cannot appeal from a judgment to which he has stipulated, as part of a settlement. [Citations.]" (*Papadakis v. Zelis* (1991) 230 Cal.App.3d 1385, 1387-1388.) There has been no showing or argument that the court's June 24, 2008 order may be appealed under an exception allowing appeal from a judgment that does not accurately reflect the parties' stipulation. (See *Reed v. Murphy* (1925) 196 Cal. 395, 399 ["if a consent judgment or decree is different from or goes beyond the terms of the stipulation which forms its basis it may be set aside upon appeal or by other appropriate procedure, as it would not be in reality a consent judgment"].)

In addition, each purported appellant is not "aggrieved" to the extent that she or he was the defendant or respondent in cases apparently dismissed or was not a party in a

particular case. (See § 902, *Bates v. John Deere Co.* (1983) 148 Cal.App.3d 40, 53 [dismissed party has no legal standing as appellant]; *People v. Arthur Murray, Inc.* (1965) 238 Cal.App.2d 333, 338 [nonparties have no right of appeal].) Only one case involved Anh Pho, a civil harassment proceeding brought by Loc Mai against him (107CH001076), and it appears to have been dismissed with prejudice upon request. Therefore, he is not aggrieved in any of the seven cases. Trang Phan is not an aggrieved party in the defamation action against her (107CV079516) since it appears to have been dismissed with prejudice upon request. Neither is she an aggrieved party in case no. 107CH001076, which did not involve her.

In their briefs, purported appellants acknowledge that "a consent judgment is ordinarily not appealable" but claim fraud occurred and indicate that this appeal must be allowed to "provide [them] with substantial justice." They complain that respondent Thuy Mai violated the settlement agreement by harassing and threatening them on March 19, 2008 and respondents violated the settlement agreement by failing to pay the agreed amount. Appellants indicate this is the reason they filed a motion below to show good cause to not dismiss the seven cases. In their briefs and in their written opposition to imposition of sanctions, they refer to circumstances in support of their claim to the moral high ground but they have not provided a record establishing any right to appeal. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 [appellant bears burden of providing adequate record on appeal]; *In re Kathy P.* (1979) 25 Cal.3d 91, 102 [same].)

As evident from the reporter's transcript of the March 10, 2008 hearing, the agreed settlement provided for judicial supervision and enforcement of the settlement under section 664.6, if necessary. That section provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the

court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

The final sentence in section 664.6, added in 1993 (Stats.1993, ch. 768, § 1, p. 4260), has been construed to mean that "even though a settlement may call for a case to be dismissed, or the plaintiff may dismiss the suit of its own accord, the court may nevertheless retain jurisdiction to enforce the terms of the settlement, until such time as all of its terms have been performed by the parties, *if the parties have requested this specific retention of jurisdiction.*" (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 439.) "[T]he request for retention of jurisdiction must conform to the same three requirements which the Legislature and the courts have deemed necessary for section 664.6 enforcement of the settlement itself: the request must be made (1) during the pendency of the case, not after the case has been dismissed in its entirety, (2) by the parties themselves, and (3) either in a writing signed by the parties or orally before the court." (*Id.* at p 440.) Here, it appears that the superior court retained jurisdiction to enforce the stipulated settlement under section 664.6.

C. Sanctions

Section 907 provides: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." (See Cal. Rules of Court, rule 8.276.) This purported appeal is certainly frivolous in that they have not provided a record establishing any right to appeal. Attorney Harwood's declaration in support of the sanctions motion indicates that respondents Thuy Mai and Loc Mai have incurred costs and attorney's fees of \$3,200.

Purported appellants are not excused from responsibility for pursuing a frivolous appeal because they are representing themselves. "Under the law, a party may choose to act as his or her own attorney. (*Paradise v. Nowlin* (1948) 86 Cal.App.2d 897, 898 . . . ; *Gray v. Justice's Court* (1937) 18 Cal.App.2d 420, 423 . . .) '[S]uch a party is to be

treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]" (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1210) Thus, as is the case with attorneys, pro. per. litigants must follow correct rules of procedure. [Citations.]" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247; see *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984 [making "clear that mere self-representation is not a ground for exceptionally lenient treatment"]; *Ferguson v. Keays* (1971) 4 Cal.3d 649, 658 ["It should go without saying that [sanctions for frivolous appeals] must be evenly applied and equally imposed upon indigent and nonindigent alike"].) The California Supreme Court has stated: "Except when a particular rule provides otherwise, the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. [Citation.] . . . A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation." (*Rappleyea v. Campbell, supra*, 8 Cal.4th at pp. 984-985.)

Disposition

The purported appeal is dismissed without prejudice to bringing a motion in the superior court to enforce the stipulated settlement pursuant to Code of Civil Procedure section 664.6. The motion for sanctions filed by respondents Thuy Mai and Loc Mai is granted. Trang Phan and Anh Pho shall bear all costs on appeal and they shall pay monetary sanctions in the amount of \$3,200 to respondents Thuy Mai and Loc Mai.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.